

No. 49075-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LERONE MAJOR, JR.,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge

BRIEF OF APPELLANT

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1319
Winthrop, WA 98862
(509) 996-3959

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A. ASSIGNMENTS OF ERROR

1. Trial counsel was ineffective for failing to object to violations of a motion in limine the court granted pre-trial prohibiting the State from characterizing Mr. Major's wife, Jazmine Graves, as a "victim."

2. The trial court erred in ordering community custody and community custody conditions for gross misdemeanor counts 4, 5, 6, and 7.

3. The trial court erred in suspending the misdemeanor sentences.

4. If the State substantially prevails on appeal, any request for appellate costs should be denied.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether defense counsel was ineffective for failing to object to repeated violations of his granted motion in limine prohibiting witnesses from referring to Mr. Major's wife, Jazmine Graves, as the "victim?"

2. Whether the trial court lacked statutory authority to impose suspended sentences, community custody, and community custody conditions on Mr. Major's four misdemeanor convictions when the court ordered Major serve the maximum 364-day sentences on each misdemeanor concurrent with Major's 19-month felony sentence?

3. Whether Mr. Major must pay appellate costs if he does not substantially prevail on appeal and the State requests costs?

C. STATEMENT OF THE CASE

1. Counts, Convictions, and Sentence

A jury convicted Lerone Major of five crimes:

- count 3 - felony violation of a no contact order (assault)
- counts 5 and 6 - assault in the fourth degree
- count 4 – gross misdemeanor violation of a no contact order
- count 7 - interfering with the reporting of domestic violence.

RP¹ 5/12 at 184-85; CP 4-5, 12, 14, 16, 18, 20. Each count was plead and proved as a domestic violence offense. CP 4-5, 13, 15, 17, 19, 20. Mr. Major's wife, Jazmine Graves, was the complaining party for each offense. CP 4-5.

The jury acquitted Mr. Graves of counts 1 and 2, burglary in the first degree and assault in the second degree. RP 5/12 at 184; CP 7, 9.

At sentencing, the court imposed a 19-month sentence on the felony violation of the no contact order plus 12 months of community

¹ The citation to the Report of Proceeding ("RP") is via the specific hearing date and applicable page number.

custody. RP 6/14 at 19; CP 29-30. The court agreed with the parties that counts 3 and 5 (felony violation of the no contact order and assault in the fourth degree) constituted the same criminal conduct. RP 6/14 at 16; CP 26. The court imposed the maximum 364-day sentence on each of the four misdemeanors (counts 4-7) and ordered the sentences served concurrently with the 19-month felony sentence. CP 29-30. The court also purportedly suspended each misdemeanor's 364-day maximum sentence on the condition that Major abide by 12 months of community custody on each count. RP 6/14 at 19-20; CP 30.

Major appeals all portions of his judgment and sentence. CP 21.

2. Motion in limine

Defense counsel filed written motions in limine. Supplemental Designation of Clerk's Papers, Defendant's Motions in Limine. Prior to taking testimony, the court heard the motions. RP 5/9 at 9. The State did not object to, and the trial court granted, Mr. Major's motion in limine 12:

12. Any reference to the complaining witness as the "victim"
[citation to authority omitted].

RP 5/9 at 9.

3. Trial evidence

Jazmine Graves and Lerone Major met in September 2013 and married in March 2015. RP 5/10 at 6-7. Within days of their marriage, the couple learned they were pregnant with their first child. RP 5/10 at 8-9., Mr. Major moved into Ms. Graves' apartment when they married. RP 5/10 at 7-8.

In March 2015, an incident occurred when Mr. Major brought an intoxicated woman to the apartment parking lot at 3:00 a.m. RP 5/11 at 9. As a fall out of that occurrence, Mr. Major was prosecuted for a domestic violence offense and a post-conviction domestic violence no-contact order issued prohibiting Major from contact with Ms. Graves or being within 500 feet of her residence. RP 5/11 at 43-46. Supp. DCP. Exhibit 20. The order is in effect to April 2017.

Ms. Graves was angry with her husband. The couple never resolved their differences over the March 2015 incident. Ms. Graves had lingering questions as to what really happened that morning. RP 5/11 at 9-10. Yet, Ms. Graves made at least 6 attempts to have the no-contact order rescinded because she did not want it in the first place. RP 5/11 at 10-11.

Ms. Graves stopped living in the apartment around July or August 2015. RP 5/10 at 9. She left because the apartment was mildewed and

triggered her asthma. RP 5/10 at 10. She moved in with her parents but still kept furniture and personal items, such as clothing, in the apartment even though she no longer considered it her home. RP 5/10 at 10. After Ms. Graves left the apartment, Mr. Major had his name put on the apartment's lease. RP 5/11 at 108.

On September 1, 2015, Ms. Graves' father spent part of a day moving large furniture items out of the apartment. RP 5/10 at 11, 75-77. Later that evening, Mr. Major was in the apartment's living room watching a movie when 7-month pregnant Ms. Graves showed up. RP 5/11 at 64, 66. She went into the bedroom and shut the door and gathered some clothing. RP 5/10 at 11. Mr. Major opened the bedroom door and told her to leave. She refused to do so. RP 5/10 at 14.

The couple argued. RP 5/10 at 14. Per Ms. Graves, Mr. Major got in her face. RP 5/10 at 30. She shoved him into a wall and he went "crazy." Id. at 14, 30. He swung at her and slapped her face. Id. at 31. Ms. Graves hit and slapped Mr. Major. Id. at 31. Mr. Major defended himself by raising his arms to deflect his wife's blows and to hold her back from hitting him. RP 5/11 at 101. At one point, a movement of his hand knocked Ms. Graves' glasses off her face. Id. at 102. Mr. Major may also have had his hand on Ms. Graves' neck while trying to hold her back from pushing him. Id.

Mr. Major grabbed what he believed was his phone from a charger. RP 5/11 at 99. Mr. Major and Ms. Graves had phones that looked very much alike. Ms. Graves complained Mr. Major had taken her phone from the charger. The couple argued over the phone until Mr. Major agreed to look at the distinguishing name on the back of the phone. Mr. Major apologized for his mistake and gave the phone back to Ms. Graves. RP 5/10 at 34-35. Ms. Graves wanted Mr. Major out of the apartment. She went into the bathroom, called 911, and spoke to an operator. RP 5/10 at 37. While she was on the phone, the couple argued and the call disconnected. RP 5/10 at 37-40. Ms. Graves attributed the disconnected call to her phone running out of battery. RP 5/10 at 110.

Mr. Major put on his clothes to leave. RP 5/10 at 48. The 911 operator called back. Ms. Graves continued to tell the operator she wanted Mr. Major out of the apartment. Id. at 49. Ms. Graves pushed and shoved Mr. Major again before he left the apartment. Id. The police stopped Mr. Major's car several blocks from the apartment and arrested him. RP 5/10 at 77-79; RP 5/11 at 111.

The State offered both recorded 911 calls into evidence. RP 5/10 at 50-59. Mr. Major did not object to the playing of either call. RP 5/10 at 51-54 (first call); RP 5/10 54-59 (second call).

The police took Mr. Major to the Thurston County Jail for booking. Ms. Graves' family took her to the hospital to check on the baby. RP 5/10 at 60-61. Lacey Police Officer Joshua Bartz talked to Ms. Graves at the hospital and took a recorded taped statement from her. RP 5/11 at 32. Mr. Major did not object to the jury hearing the taped statement. RP 5/11 at 63 -75.

Officer Bartz also took pictures of Ms. Graves at the hospital. RP 5/11 at 35-36. In describing the pictures, the officer referred to Ms. Graves as "victim Jazmine". Id. at 38-39. Defense counsel did not object. Id.

While at the hospital, Ms. Graves received calls from an unfamiliar 800 number. RP 5/10 at 60-61. She answered the first call. A recorded voice said the call was from an inmate at the Thurston County Jail. A recorded voice said the caller was "Ron." Id. Ms. Graves recognized her husband's voice. Id. at 61. Officer Bartz investigated calls from the Thurston County Jail during that window of time. There were calls to Ms. Graves' phone number from a jail phone using a PIN access code assigned to Mr. Major. RP 5/11 at 57-58.

At the time of the occurrence, Mr. Major was serving in the Army and planned to make it his career. RP 5/11 at 97.

4. Closing argument

In closing argument, the prosecutor argued specific instances of conduct supported each offense. RP 5/12 at 50-64.

The count 5 alleged assault was for the initial slapping and hitting when the couple argued in the bedroom. The count 3 alleged felony violation of the no contact order was knocking off Ms. Graves' glasses in the bedroom. The count 6 alleged assault was for the striking and hitting after the first 911 call. The count 4 alleged misdemeanor violation of the no contact order was the call from the jail. And the count 7 alleged interfering with reporting of domestic violence was the grabbing of the phone during the first call to 911. RP 5/12 at 50-64.

Mr. Major argued Ms. Graves had lingering anger over the March 2015 incident with the woman in the parking lot. Her inconsistent explanation of the events that evening made her unreliable, and unbelievable. Any physical interaction by Mr. Major that evening was in self-defense. RP 5/12 at 164-76.

D. ARGUMENT

1. Mr. Major is entitled to a new trial based on ineffective assistance of counsel when trial counsel failed to object to evidence suppressed following a successful defense motion in limine.

a. Defense counsel failed to object to violations of a granted motion in limine prohibiting reference to Ms. Graves' as the "victim."

Defense counsel moved in limine to suppress any reference to Ms. Graves as the "victim." Supp. DCP. The State agreed with the motion and the trial court granted it. RP 5/9 at 8-9. The State violated this motion in limine when Officer Bartz repeatedly referred to "victim Jazmine" in describing her injuries in photographs. RP 5/11 at 37-39.

To preserve for appeal a violation of a motion in limine, the party who successfully brought the motion must make a proper objection at the time of the violation. *State v. Sullivan*, 69 Wn. App. 167, 171-172, 847 P.2d 953 (2006). See also Karl B. Tegland, 5D Washington Practice: Evidence Law and Practice, ER 103 at § 109:9 (2016 update) (If the court grants a motion to exclude evidence but then admits evidence that arguably violates the pretrial order, opposing counsel should renew the objection to make a record for appeal.) Unequivocally, when the trial court grants a defense

motion in limine, the defense must object to any potential violation of the order in limine to preserve the error for appeal. *State v. Weber*, 159 Wn.2d 252, 271-272, 149 P.3d 646 (2006).

Here, although defense counsel prevailed on his motion to suppress reference to any characterization of Ms. Graves as the “victim,” he failed to object when that motion was violated. RP 5/11 at 37-39. As in *Weber*, the requirement to object is mandatory and failing to object denies the defendant the right to directly raise the issue on appeal. *Weber*, 159 at 271-72.

Because counsel was not excused from objecting to Officer Bartz’s improper opinion, his failure to object and request a curative instruction or move for a mistrial was ineffective assistance of counsel because such an objection would have given the trial court the opportunity to advise the jury to disregard or grant a mistrial.

Under RAP 2.5 when a trial attorney fails to make an objection and preserve an issue for review, the issue may be raised if it is manifest error affecting a constitutional right. Denial of effective assistance of counsel is a manifest error affecting a constitutional right which may be raised for the first time on appeal. *State v. Greiff*, 141 Wn.2d 910, 924, 10 P.3d 390 (2000).

b. Prejudicial deficient performance denied Mr. Major effective counsel.

The Sixth Amendment to the United States Constitution and Washington Constitution Article 1, Section 22 guarantee a defendant the right to effective assistance of counsel. To prevail on a claim of ineffective assistance, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Review of defense counsel's performance is deferential, and presumed reasonable. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335-336, 899 P.2d 1251 (1995). To rebut this presumption, the defendant must establish the absence of any "conceivable legitimate tactic explaining counsel's performance." *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

To establish prejudice, a defendant must show a reasonable probability that the trial outcome would have been different absent counsel's deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Failure on either prong of the test is fatal to a claim of

ineffective assistance of counsel. *Strickland*, 466 U.S. at 697. This Court reviews de novo claims of ineffective assistance of counsel. *McFarland*, 127 Wn.2d at 334–35.

i. Deficient Performance

Counsel’s failure to object to Officer Bartz’s violation of the motion in limine, fell below an objective standard of reasonableness. The sole purpose of bringing the motion in limine was to prevent the jury from being subject to an improper opinion of Mr. Major’s guilt. *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2008)(a witness may not give, directly or by inference, an opinion on a defendant's guilt).

Officer Bartz’s characterization of Ms. Graves as the “victim” was a direct comment on Mr. Major’s guilt. In her direct testimony, Ms. Graves characterized herself as both the aggressor and a mutual participant in the pushing and shoving with Mr. Major. When she felt her husband was too close to her, she started the physical interaction by shoving him into a wall. Thereafter, by her testimony, the couple mutually battled by pushing, slapping, and hitting each other. Mr. Major characterized his actions as defensive. Ms. Graves’ actions required him to defend himself by holding his hands and arms up to ward off blows and to push Ms. Graves back in defense of himself. Officer Bartz did not witness the couple’s interaction.

He had no place in characterizing Ms. Graves as the victim and Mr. Major as the opposite of that in this two person confrontation. Guilt is for the jury to decide and not for the officer to speculate on. *Dolan*, 118 Wn. App. at 328-29.

Defense counsel properly raised the motion in limine to prevent just the sort of characterization as Officer Bartz presented. Defense counsel was ineffective in failing to object and preserve the error for review. It was deficient representation. *Matter of Pirtle*, 136 Wn.2d 467, 489, 965 P.2d 593 (1998).

ii. Prejudice

There was no strategic or tactical reason to fail to object to evidence successfully suppressed in a motion in limine, or to fail to move to strike, request a curative instruction or move for a mistrial. There is a reasonable probability had Officer Bartz's improper opinion testimony been stricken and the jury admonished to disregard it, the outcome of the trial could have been different. Here the trial court agreed to suppress reference to characterization of Ms. Graves' as the "victim" because it understood that such a reference was improper opinion and unduly prejudicial. RP 5/9 at 7, 9; Supp. DCP, Defendant's Motion in Limine No. 12.

This is similar to a situation where defense counsel unsuccessfully moved to suppress on an incorrect basis rather than on a correct basis that the trial court likely would have granted. *State v. Hamilton*, 179 Wn. App. 870, 882, 320 P.3d 142 (2014). In *Hamilton*, this Court held that defense counsel was ineffective for failing to move to suppress on the correct grounds and the defendant was prejudiced because the outcome likely would have differed. *Id.* at 888.

Here too, had counsel timely objected to the violation of the motion in limine, the trial court would likely have provided a remedy because it had already agreed that admission of the officer's opinion testimony was overly prejudicial and improper and invaded the jury's exclusive province of finding fact and determining guilt. Ms. Graves and Mr. Major were the only two people in the apartment. Ms. Graves' injuries, as documented in the photographs and described by Officer Bartz did not dictate the "victim" conclusion. Rather, they could have occurred via the mutual pushing, slapping and hitting described by Ms. Graves and during the defense actions described by Mr. Major. Neither explanation was determinative. It was not Officer Bartz's right to take a side and offer an opinion as to who was the victim and, by inference, who was the aggressor to be charged with multiple crimes.

Without Officer Bartz's testimony casting Ms. Graves in the light as the victim, or with a proper objection, whether the remedy would have been to grant a mistrial, or strike the testimony with a curative instruction, the outcome likely would have differed because of the she-said, he-said facts. It is reasonably likely that the jury would have acquitted if they had not been led to believe that in Officer Bartz's professional police officer opinion, Ms. Graves was the victim of Mr. Major's aggression. Without that, at worst, Mr. Major's only conviction would be for a single misdemeanor violation of a no contact order for the jail call. This Court should reverse and remand for a new trial.

2. The trial court lacked authority to suspend any portion of the misdemeanor sentences, or impose misdemeanor community custody, because the court sentenced Mr. Major to serve the misdemeanors concurrent with the 19 month felony sentence.

A court can grant probation by "suspend[ing] the imposition or the execution of the sentence." RCW 9.95.210(1). But if a court imposes a maximum sentence of confinement and suspends none of it, the court lacks the authority to impose probation. *State v. Gailus*, 136 Wn. App. 191, 201, 147 P.3d 1300 (2006), *overruled on other grounds by State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009). The sentence and community custody

imposed for the gross misdemeanor convictions under counts 4, 5, 6, and 7 violates the rule of *Gailus*.

Counts 4, 5, 6, and 7, charging violation of a no contact order, assault in the fourth degree, and interfering with reporting of domestic violence, are all gross misdemeanor offenses. RCW 26.50.110(1); RCW 9A.36.041; RCW 9A.36.150. A gross misdemeanor is punishable by imprisonment for a maximum term of not more than 364 days. RCW 9A.20.021(2).

The court at section 4.5(a) of the judgment and sentence, imposed a sentence of 19 months on felony count 3 and 364 days each on counts 4, 5, 6, and 7. CP 29. The court ordered all counts “shall be served concurrently.” CP 30. The court also purportedly suspended all of the time on the four misdemeanor counts - 4, 5, 6, and 7 - on condition that Mr. Major abide by 12 months of community custody conditions on each count. CP 30. However, because the court ordered the maximum 364 days sentence on each misdemeanor served concurrent with the 19-month felony sentence, no time remained to suspend on any of the four misdemeanor sentences. CP 29-30. Because the sentence suspends no jail time, the case should be remanded to strike the “suspended” language and vacate all misdemeanor community custody obligations. *Gailus*, at 201.

3. If the State substantially prevails on appeal, any request for appellate costs should be denied.

If Mr. Major does not substantially prevail on appeal, he requests that no costs of appeal be authorized under Title 14 of the Rules of Appellate Procedure. The Court of Appeals has discretion to deny a cost bill even where the State is the substantially prevailing party on appeal. *State v. Sinclair*, 192 Wn. App. 380, 391, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016); RCW 10.73.160(1) (the “court of appeals . . . may require an adult . . . to pay appellate costs.”); *State v. Grant*, __ Wn. App. __, 385 P.3d 184 (2016). Imposing costs against indigent defendants raises problems well documented in *Blazina*: “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). *Sinclair* recognized the concerns expressed in *Blazina* applied to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. *Sinclair*, 192 Wn. App. at 391.

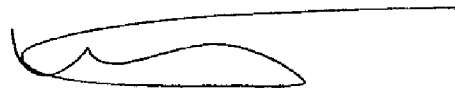
The trial court found Mr. Major qualified for indigent defense at trial and on appeal. CP 6 (trial); CP 22-24 (appeal). Importantly, there is a presumption of continued indigency throughout the review process. *Sinclair*, 192 Wn. App. at 393; RAP 15.2(f). As in *Sinclair*, there is no trial

court order finding Mr. Major's financial condition has improved or is likely to improve. *Sinclair*, 192 Wn. App. at 393. Mr. Major is serving a 19-month sentence. CP 29. He has no doubt lost his Army career. RP 5/11 at 97; RP 6/14 at 11. He has a young son to support. Supp. DCP, Motion and Declaration for Order of Indigency; RP 5/10 at 8-9. Given the serious concerns recognized in *Blazina* and *Sinclair*, this court should soundly exercise its discretion by denying the State's request for appellate costs in this appeal involving an indigent appellant.

E. CONCLUSION

Ineffective assistance of counsel requires reversal and remand. Alternatively, the court should strike the misdemeanor community custody and related conditions. Finally, any request for appeal costs should be denied.

Respectfully submitted January 9, 2017.



LISA E. TABBUT/WSBA 21344
Attorney for Lerone Major, Jr.

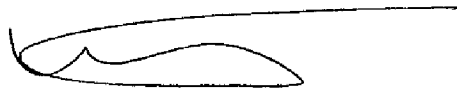
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Thurston County Prosecutor's Office, at paoappeals@co.thurston.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Lerone Major, Jr./DOC#391680, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed January 9, 2017, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Lerone Major, Jr., Appellant

LISA E TABBUT LAW OFFICE

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